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No. 487

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA AND BORG-WARNER CORPORATION (DETROIT GEAR DIVISION), AN ILLINOIS CORPORATION, APPELLANTS

v.

CITY OF DETROIT, A MUNICIPAL CORPORATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the Circuit Court of Wayne County, Michigan, is not reported. The opinion of the Supreme Court of Michigan affirming the judgment of the Circuit Court is reported in 345 Mich. 601. The opinions of the Circuit Court and the Supreme Court of Michigan are set forth in the Appendix, *infra*, pp. 14–28.

JURISDICTION

This suit was brought under the authority of Section 211.53, Compiled Laws of Michigan (1948), Section 7.97, 6 Michigan Statutes Annotated, for the recovery of taxes assessed, levied and collected under

the provisions of Act No. 189, Public Acts of Michigan, Session of 1953. It was alleged that the Michigan statute, as applied to the facts of this case, was repugnant to the Constitution of the United States and invalid. The Supreme Court of the State of Michigan decided the question in favor of the validity of the statute and the taxes which it imposed, and entered judgment May 14, 1956. Notice of appeal was filed by the United States and Borg-Warner Corporation on August 9, 1956. Jurisdiction to review a judgment of the highest court of a state by appeal is conferred on this Court by 28 U. S. C. 1257 (2) and 2101 (c). That such jurisdiction exists in the circumstances of this case is sustained by the following decisions: *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481; *United States* v. *Allegheny County*, 322 U. S. 174, 191; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110.

STATUTE INVOLVED

Michigan Public and Local Acts (1953), p. 252:

PUBLIC ACT No. 189.

AN ACT to provide for the taxation of lessees and users of tax-exempt property.

The People of the State of Michigan enact:

SEC. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public

airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: *Provided, however,* That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

SEC. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit.

This act is ordered to take immediate effect. Approved June 10, 1953.

QUESTIONS PRESENTED

1. Whether Act 189 of the Public Acts of Michigan (1953), as applied to the facts of this case, is repugnant to the Constitution of the United States and invalid because it taxes the property of the United States without the consent of Congress.

2. Whether Act 189, which taxes the property of the United States—to the full extent of its value—to its lessee, is repugnant to the Constitution and laws of the United States, where Congress by express statute has exercised its powers of legislation

with respect to the property to provide that a state may tax only to the extent of the value of the lessee's interest and not to the same extent as though the lessee were the owner of the property.

3. Whether Act 189 is repugnant to the Constitution of the United States and invalid as violative of the due process and equal protection clauses of the Fourteenth Amendment because it taxes to Borg-Warner Corporation property, or the value of property, which Borg-Warner Corporation does not own but which the Act conclusively presumes it does own.

4. If Act 189 is construed as imposing a privilege tax, whether it is repugnant to the Constitution and laws of the United States because it would tax the privilege of using federal property placed in the possession of the user under the terms of a federal statute designed and enacted to accomplish a federal purpose, and whether it is repugnant to the Constitution and laws of the United States as an undue interference with the exercise by Congress of its constitutional right to dispose of and make all needful rules and regulations respecting the property belonging to the United States.

5. If Act 189 is construed as imposing a privilege tax on the lessees or users of immune federal property, whether it is repugnant to the Constitution of the United States and invalid as discriminatory in purpose and effect since it is not imposed on all lessees or users of real property but is directed at federally owned property for the purpose of collecting from the lessees or users taxes which the State

cannot assert against or collect from the United States itself or its property.

STATEMENT

Borg-Warner Corporation, an Illinois corporation, is a lessee of a portion of real property consisting of an industrial plant, building, and grounds, located at 11111 French Road, Detroit, Michigan, under a lease from the United States of America, lessor, dated August 14, 1950, effective March 8, 1948, and entered into under the authority of the Act of August 5, 1947, c. 493, 61 Stat. 774. The lease was amended by a written amendment, dated March 3, 1954, and effective as of December 1, 1952. The lease expires on March 7, 1958. It may be terminated unilaterally by the Government (a) upon declaration of a national emergency by the President or Congress, (b) upon 120 days' notice in the interest of national defense, (c) upon an offer to sell as surplus and notice by the lessee that it does not desire to exercise its purchase option, and (d) upon 120 days' notice for the lessee's default in its obligations under the lease.

In accordance with the Act of August 5, 1947, *supra,* the lease provides that if Congress acts to subject the leased premises, as distinguished from the leasehold interest, to local taxation, the lease is to be renegotiated. The amendment to the lease provides that effective March 8, 1954, and thereafter, Borg-Warner shall deduct from its rental payments any taxes assessed against it under Act 189, Michigan Public Acts of 1953, or similar taxation statutes, and that it will repay to the United States any taxes re-

funded to it and that Borg-Warner will cooperate with the Government to contest the validity of such taxes if requested to do so.

The portion of the premises leased by Borg-Warner is used by it exclusively for manufacturing purposes in its business conducted for a profit. The United States is and has been the sole owner, in fee simple, of the leased premises.

As of January 1, 1954, an assessment was made against Borg-Warner Corporation by the Board of Assessors of the City of Detroit for a tax levied under the provisions of Act 189, Michigan Public Acts of 1953, *supra*.

As to the assessment, the parties stipulated that:

1. The Board of Assessors valued the property precisely as it would have done had such property been owned in fee simple and occupied by Borg-Warner Corporation.

2. It valued such property at the true cash value of the fee simple ownership of that portion of the plant site under lease, on the basis defined in Section 211.27, Compiled Laws of 1948 (Section 7.27, 6 Michigan Statutes Annotated), giving consideration to the advantages and disadvantages enumerated in such statute.

3. The valuation concerned itself solely with that portion of the premises leased by Borg-Warner Corporation.

4. The valuation of the leased real estate thus determined was in the amount of $352,060 and such valuation was accordingly set down upon the personal

property tax rolls of the City of Detroit opposite the description of the parcel.

5. The portion under lease was not assessed to Borg-Warner Corporation pursuant to Section 211.3, Compiled Laws of 1948 (Section 7.3, 6 Michigan Statutes Annotated), as an "occupant".

6. The cash value of the right to use and occupy such parcel granted to Borg-Warner Corporation by its lease with the United States of America was not separately determined or valued.

As a result of the assessment, a tax for the year 1954 in the amount of $12,327.50 was assessed and billed to Borg-Warner Corporation by the City of Detroit. On August 16, 1954, Borg-Warner paid to the Treasurer of the City of Detroit the amount of $6,161.75, the first half of the 1954 tax, under written protest.

Neither Borg-Warner nor the United States has ever made any claim that the quantum of the assessment was erroneous.

The cause was submitted in the Circuit Court on a written stipulation of facts similar to that stipulated as the settled record on appeal, together with the introduction of certain important documents into evidence at the trial thereof which are a part of the record on appeal.

On August 25, 1955, a judgment of no cause of action was entered by the trial judge, pursuant to his written opinion.

On appeal, the Supreme Court of Michigan approved the decision of the trial court, thereby sustaining the imposition of the tax.

The appellants contended at every stage of the proceedings that Act 189 is repugnant to the Constitution of the United States and invalid in that it authorizes a tax upon real property owned by the United States of America, infringes the sovereign immunity of the United States, and violates the Fourteenth Amendment of the Constitution. The constitutional questions were raised in the trial court in the Declaration filed by the United States and Borg-Warner (R. 5–8) and in the briefs filed in the trial court and also in the Supreme Court of Michigan. The constitutional objections were considered but rejected both by the trial court (R. 47–50) and by the Supreme Court of Michigan (Op. pp. 1–9).

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important constitutional questions involving the immunity of the United States from taxation of its property by the States. The decision of the Supreme Court of Michigan, upholding the validity of a local tax which is imposed on a lessee of property belonging to the United States and which is measured by the full value of the property, carries obvious and far-reaching implications. While the precise point in issue has not been, but ought to be, settled by this Court, we believe that fundamental principles regarding the sovereign immunity of the United States, which have received repeated application in the decisions of this Court, compel the conclusion that the tax in question is constitutionally invalid.

1. *United States* v. *Allegheny County*, 322 U. S. 174, involved a lessee of machinery owned by the

United States. In the assessment of local *ad valorem* property taxes, the value of the machinery was included in the value of the lessee's property subject to tax. This Court held that the tax was invalid, saying that the property of the Federal Government (p. 189) "to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee."

Although there are certain formal differences between the local property tax held invalid in the *Allegheny County* case and the tax imposed in the present case, in every essential respect the situations are similar. We believe that the Supreme Court of Michigan erred in holding that these minor differences were sufficient grounds of distinction which would warrant the conclusion that the tax here was valid, despite the holding in *Allegheny County* that the tax there was invalid.

(a) The tax here cannot be upheld as a tax on the lessee of the property rather than a tax on the property itself. In *Allegheny County*, the taxing authorities similarly denied that the tax was on the property of the United States. But this Court, looking to the mode of the tax, namely (p. 184), "the identification and valuation of the variable individual holdings to be taxed, commonly called the assessment," and "the application of a uniform rate calculated on the need for public revenues," concluded that the tax was on the property and not a form of personal taxation.

The same general characteristics are to be found in the tax here in issue. Property which is other-

wise exempt from taxation is identified and valued in the same manner as property which is not exempt. That is, the assessment is the same as it is with respect to property which is concededly subject to the general property tax. And the tax is calculated at the same uniform rate which is assessed to owners of property subject to the general property tax. Hence, neither the values being assessed nor the tax rate being imposed differ in any respect from the general property tax which is concededly imposed on the property itself. Accordingly, here, as in *Allegheny County*, the conclusion seems inevitable that the tax is not a form of personal taxation, but is a property tax.

(b) The tax here gains no vitality from the statutory provisions which preclude the tax from being a lien on the property itself. In the *Allegheny* case it was also argued, in support of the tax, that the tax lien would not extend to the machinery in question. The answer which this Court gave in that case is equally applicable here; the opinion stated (p. 187): "But renunciation of any lien on Government property itself, which could not be sustained in any event, hardly establishes that it is not being taxed."

(c) Finally, the tax here imposed does not lose its constitutional infirmities simply because the Supreme Court of Michigan characterized it as a specific tax imposed on the lessee for the privilege of leasing the Government's property. As we have observed, the nature of the tax requires the conclusion that it is on the property itself. Moreover, since the Government can act only through instrumentalities and agencies, a

tax imposed on the right to have possession of the Government's property and measured by the full value of the property, is a tax which cannot be constitutionally imposed in the absence of the express consent of Congress. As this Court observed in the *Allegheny County* case, a state can no more tax to a government contractor the full value of government property in his possession than it could tax a (p. 189) "Collector of Internal Revenue, Postmaster, Clerk of the United States Court, or other federal officer" because of moneys of the United States which were in his possession.

This case does not present the question whether, in the absence of the consent of Congress, a state could tax the lessee on the privilege of leasing property of the United States where all that is being taxed is the value of that privilege. Congress has specifically consented to such taxation (Act of August 5, 1947, c. 493, 61 Stat. 774), but the Michigan tax does not purport to value or tax the lessee's interest. And, clearly, the lessee's interest here, in view of the short term of the lease and the provisions for cancellation, could not equal the full value of the property itself. Cf. *Offutt Housing Co.* v. *Sarpy County*, 351 U. S. 253.

2. The United States, as the owner of property strategically important to the national defense in the event of an emergency, has leased it on a stand-by basis to a commercial user, thus insuring that the property will be available whenever it is needed by the United States. The lease provides for a rental which requires the lessee to pay an adequate consideration for the use of the property; indeed, since the

full rental value is already being paid by the lessee, the lease specifically provides that any tax required to be paid by the lessee with respect to its use of the property shall be deducted from its rental obligation.

We believe it is plain that any local tax of the kind here involved, imposed on the lessee as a consequence of its possession of Government-owned property, represents an undue and unconstitutional interference with the sovereign right of the United States freely to possess or dispose of its property.

3. We think it is equally plain that this case presents a question of substantial importance which affects the United States and every State. If the Supreme Court of Michigan is correct, the *Allegheny County* case means no more than that, to impose a valid tax, a state legislature need only bill the tax to the lessee, while still taxing the full value of the Government-owned property at the same rate at which all other property is taxed. The correctness of such a view of the Constitution can be settled only by a decision of this Court.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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OCTOBER 1956.

APPENDIX

STATE OF MICHIGAN
SUPREME COURT

[Caption omitted.]

OPINION

BEFORE THE ENTIRE BENCH.
DETHMERS, C. J.

The United States owns real estate consisting of an industrial plant, building and grounds in Detroit. A portion of it is leased to plaintiff Borg-Warner Corporation, which uses it exclusively for manufacturing purposes in its business conducted for profit. The lease provides that Borg-Warner may deduct from rent to United States any taxes assessed against and paid by Borg-Warner under PA 1953, No. 189 (CLS 1954, Secs. 211.181, 211.182 [Stat. Ann. 1955 Cum. Supp. Secs. 7.7 (5), 7.7 (6)]), by reason of its use of the premises, that it will cooperate with United States to contest validity of such taxes and pay same under protest, if required by United States, and that it will repay United States any such taxes refunded.

Act No. 189 reads:

> AN ACT to provide for the taxation of lessees and users of tax-exempt property.
>
> *The People of the State of Michigan enact:*
>
> 211.181 Taxation of lessees and users of tax-exempt property; exception.
>
> [M. S. A. 7.7 (5)]
>
> SEC. 1. When any real property which for any reason is exempt from taxation is leased,

loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: *Provided, however,* That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

211.182 Assessment and collection; action of assumpsit. [M. S. A. 7.7 (6)].

SEC. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit.

Under the act the taxing authorities of defendant city imposed a tax on Borg-Warner, measured by the true cash value of the leased real estate. Borg-Warner paid the first half of the tax under written protest and this action was brought to recover it. From judgment of no cause for action plaintiffs appeal.

Plaintiffs contend that Act 189 provides for an *ad valorem* general property tax on real property owned by United States and is, therefore, repugnant to the Constitution of the United States, which impliedly grants immunity from State and local taxation to

property of United States. Defendant counters with the contention that it is a specific tax on Borg-Warner's privilege of using the property, which tax may, constitutionally, be measured by the full value of that property.

Plaintiffs believe that *United States* v. *Allegheny County*, 322 U. S. 174, is controlling, urge that under decision in that case the tax in the instant case must be held to be on United States property, and quote from opinion therein.

> We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee.

In that case Mesta Machine Company undertook to make guns for United States. It owned a manufacturing plant which was not equipped for manufacture of ordnance. United States leased necessary machinery to Mesta, which installed it in its plant. Allegheny County, in assessing Mesta's real property for *ad valorem* taxes, included the value of the machinery. This the court held unconstitutional as constituting imposition of a tax on immune property of United States. The court said, *inter alia:*

> It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used ad valorem general property tax. * * * This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. Its procedures are more nearly analogous to procedures *in rem* than to those *in personam*. While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is

lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment.

The Pennsylvania statutes embody this scheme of taxation. They are a century old. The basic provision reads: "The following *subjects and property* shall * * * be valued and assessed, and *subject to taxation.*" Taxes are "declared to be a *first lien on said property.*" (Emphasis supplied.) It is only under these legislative provisions that the tax in question is laid.

The procedure of the assessors is consistent with no other theory than that the machinery itself was being assessed and taxed exactly as land was being assessed and taxed. * * *

We hold that the substance of this procedure is to lay an ad valorem general property tax on property owned by the United States. * * *

Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. * * *

We think, however, that the Government's property interests are not taxable either to it or to its bailee. The "Government" is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purpose. He may be an officer, an agent, or a contractor. *His personal advantages from the relationship by way of* salary, profit, or *beneficial personal use of the property may be taxed as we have held.* But neither he nor the Government can be taxed for the Government's property interest. [Emphasis supplied.]

We agree with defendant that Allegheny is distinguishable from the instant case in controlling respects. To begin with, the hiatus in Section 1 of Act 189, resulting from failure to express the subject of the predicate "shall be subject to taxation", which has been expressed in the bill as passed in the House, was apparently occasioned by inadvertent omission in the Senate. That subject was clearly intended to be, as in the House draft, "the lessee or user of such property." This is evident from the title of the act as well as from Section 2, which provides that the taxes shall be assessed to the lessees or users of real property. Thus, the Michigan act provides that it is the users of tax-exempt property who shall be subject to taxation, as contrasted with the Pennsylvania act considered in Allegheny, which provided that certain property should be subject to taxation. In further contract with Allegheny, and stated in the converse of the language therein, the tax at bar is a form of personal taxation and not a tax against the property as a thing—its procedures are more analogous to procedures *in personam* than *in rem*—the power to tax is not predicated upon jurisdiction of the property, but upon jurisdiction of the user—the property is not the subject of the tax and does not stand as security for its payment. These distinctions between Allegheny and the case at bar we think go to the roots of the problem of the nature of the taxes in the two cases and leave the holding in Allegheny that the tax there was on United States property without application here.

In *Educational Films Corp.* v. *Ward*, 282 U. S. 379, the court upheld a New York franchise tax on certain classes of domestic corporations, payable each year in advance and measured by the corporation's entire net income of the preceding year, which, in the case of plaintiff therein, was derived in part as royalties from

copyrights granted by the United States. The court held that, assuming Federal copyrights and income therefrom to be immune from State taxation as instrumentalities of the Federal government, the franchise tax in question insofar as measured by royalties from copyrights was not void as a tax on Federal instrumentalities. In so holding the court said:

> If we look to the operation of the present statute, it is plain that it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise. If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax. Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise.

Applying the test of the quoted language here, it is plain that Act 189 can have no application independent of Borg-Warner's enjoyment of the privilege of using the real estate in connection with its business conducted for profit, and that the tax is, therefore, not an *ad valorem* tax on real property of United States and void accordingly, but a specific tax on Borg-Warner's privilege of using it and, hence, valid. This squares with the above quoted language from Allegheny to the effect that Mesta enjoyed a right of possession which the court seemed to suggest, without deciding, could be taxed by the State, and the further statement that it had theretofore held that a contractor's personal advantages from the beneficial personal use of United States property may be taxed by a State.

That the economic burden of the tax, as distinguished from its legal incidence, happens to fall on United States is no barrier to its validity. *James* v. *Dravco Contracting Co.*, 302 U. S. 134; *Alabama* v. *King & Boozer*, 314 U. S. 1; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495.

Plaintiffs say, however, that even if Act 189 stated in express terms that it was imposing a specific tax on the privilege of using the immune United States property, still it would be unconstitutional because the full value of the property is used as the measure in assessing the tax, thus evidencing a legislative intent to accomplish indirectly what may not be done directly, namely, to tax property of the United States. In this connection they cite *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *New Jersey Insurance Co.* v. *Division of Tax Appeals*, 338 U. S. 665; *Missouri* v. *Gehner*, 281 U. S. 313. Plaintiffs say that, however phrased, the act is, in fact, aimed at and intended to reach the property of United States in a manner held invalid in *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, and *Miller* v. *Milwaukee*, 272 U. S. 713. We come, then, to the same position confronted by the court in *Educational Films Corp.* v. *Ward*, *supra*, when it said:

> Hence, we pass to the chief objection urged against it, that such a tax, however described, and even though deemed to be a tax on franchises, is invalid so far as it is measured by income derived from a federal instrumentality.

Consider, then, these cases cited by plaintiffs. Involved in the *Pittman* and *Federal Land Bank* Cases were State taxes imposed on mortgages owned by Federal instrumentalities. In the *New Jersey Insurance Company* Case a New Jersey statute was con-

sidered which provided for an intangible personal property tax which in that case had been assessed against tax-exempt United States bonds held by a domestic corporation, the court pointing out that the tax was not considered by the New Jersey legislature or taxing authorities as a privilege or franchise tax. Likewise, in *Missouri* v. *Gehner* the tax was on net assets of insurance companies, including exempt United States bonds held by them. In *Miller* v. *Milwaukee* the Wisconsin statute involved required a Wisconsin corporation to pay a tax on its income, excepting the portion thereof received from United States bonds. The income was later distributed as dividends to stockholders. The Wisconsin statute taxed the stockholders on such dividends only to the extent that they represented income of the corporation derived from tax-exempt United States bonds. The court held the tax on stockholders to that extent void because it was aimed solely at exempt income from United States bonds. The *Macallen* Case presented an amendment to a State taxing act which was held invalid because its sole purpose was to reach income from tax-exempt United States bonds. In none of these cases was the object of the tax nor the legislative purpose sought to be served the same as at bar. As defendant in the instant case properly points out, lessees of private nontax-exempt real estate ordinarily bear the tax burden thereon either by direct payment thereof under lease requirements or by payment of rent sufficient to include the tax; and defendant reasons that the legislative intent here was to put such lessees of private property used by them in business conducted for profit on an equal footing with users of tax-exempt government property used by them in business conducted for profit, thus avoiding discrimination against the former and elim-

inating an element of unfair competition between them by requiring an equal tax burden as to both; and defendant urges that this does not evidence an intent on the part of the legislature to aim at or reach United States property for taxation but only to treat both classes of users equally. It is obvious that each of the cases cited by plaintiffs, as just above considered, is distinguishable from the instant case because in each of them either a local tax was sought to be imposed directly on immune property or income as such, or the sole purpose of the tax act was to reach it indirectly, whereas here, as previously considered, the tax is not on the immune property but on the privilege of using it, and the act imposing it is not aimed at that property but, rather, at removing a discrimination between users of private and of public property. That such a privilege tax is not only permissible, as appears from the *Allegheny* and *Educational Films* Cases above considered, but that it is valid even though measured by the full value of the immune property or income is settled by *Plummer* v. *Coler*, 178 U. S. 115; *Home Insurance Co.* v. *New York*, 134 U. S. 594; *Educational Films Corp.* v. *Ward*, *supra*; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Pacific Co.* v. *Johnson*, 285 U. S. 480. In *Plummer* a State inheritance tax was upheld even though measured by the full value of tax-exempt United States bonds included in a bequest. In *Home Insurance Company* the court upheld a corporate franchise tax measured by the corporation's dividends and capital stock, including the full value of tax-exempt United States securities held by the corporation. In *Flint* and in *Pacific* corporate franchise taxes were upheld which were measured by income derived in part from tax-exempt United States securities. In *Educational Films Corp.*

v. *Ward, supra,* the court upheld a corporate franchise tax measured by immune income from Federal copyrights. In each of these cases the privilege tax was held valid despite use of a measure which included the full value of immune property or income.

Plaintiffs also urge that Act 189 violates Mich. Const. 1908, art. 10, Sec. 7, in imposing against a lessee an *ad valorem* tax not based on the cash value of his leasehold but of the entire fee simple interest of the owner. Holding, as we do, that the tax imposed is not *ad valorem* on the property nor on the leasehold, but a specific tax on the privilege of using the property, the mentioned constitutional provision is without application. *Shivel* v. *Kent County Treasurer,* 295 Mich. 10. See, also, *Walcott* v. *People,* 17 Mich. 68, and *Kitson* v. *Ann Arbor,* 26 Mich. 325.

Affirmed, with costs to defendant.

Justice Reid took no part in this decision.

CIRCUIT COURT OF WAYNE COUNTY

[Caption omitted]

OPINION

This is an action to recover a tax of $6,161.75 paid under protest. The case was submitted, principally on an agreed statement of facts, on April 28th last, on principal briefs to be furnished within 30 days, and reply briefs 15 days later. Defendant's brief was furnished to the Court more than two months ago, but none has been received from plaintiffs, although last promised for not later than August 20th. Under the circumstances the Court does not feel justified in delaying decision further, especially since the reasoning of defendant's brief, and the cases cited in support thereof, seem determinative of the issues.

The assessment in question was made under authority of Act 189, P. A. 1953, being C. L. 1948 Supp. 211.181–2, against plaintiff Borg-Warner, lessee of the owner, plaintiff United States. Plaintiffs claim the statute to be unconstitutional as an indirect attempt to tax property of the United States. Defendant denies this claim, and also moves that the action be dismissed because plaintiffs have not exhausted their administrative remedies under state and city laws. Defendant has indicated, however, that while it is not waiving this point, it would prefer to have decision rested on the fundamental issue of the validity of the tax.

The assessment in question was measured by the valuation of that portion of improved real property at 11111 French Road in Detroit which was occupied by Borg-Warner and used by it exclusively for manufacturing purposes in its business conducted for profit, its interest being that of a lessee.

The lease was dated August 14, 1950, effective as of March 8, 1948. By amendment dated March 3, 1954, dated as of December 1, 1952, the lease was extended for a further term of five years from March 8, 1953, at an increased rental, and permitting Borg-Warner to take credit for any taxes assessed against it under the Act in question. In this manner, the "economic burden" of the tax is claimed to be placed on the United States. Defendant takes the position that the statute authorizes a non-discriminatory tax which is not in violation of the constitutional principles mentioned.

The material portions of Act 189 provide:

> When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for

> profit, * * * shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner * * *.
>
> Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property.

It is true that in the first provision quoted, the meaning is not completely clear, obviously because, in the process of going through the legislation "mill" the words "the lessee or user of such property" were accidently dropped in recopying, instead of appearing just before the words "shall be subject to taxation" after the asterisks above. The meaning and purpose is nevertheless clear from the enactment as a whole.

It would serve no necessary purpose to analyze and quote from the decisions which I consider controlling and determinative of the issues upon which the case turns. In my opinion they justify the following conclusions:

The "incidence" of the tax falls not upon the United States, but upon plaintiff Borg-Warner, and the tax is not invalid because indirectly the "economic burden" falls upon the United States; the tax is not one upon the real estate, but upon the user; the tax is not discriminatory; it does not adversely affect any "sovereign power"; it creates no liability against the United States or any of its agencies or instrumentalities.

Some of the authorities supporting these conclusions are:

Federal Reserve Bank v. *Revenue Department*, 339 Mich. 587.

National Bank of Detroit v. *Department of Revenue*, 340 Mich. 573 (Appeal dismissed in U. S. Supreme Court May 23, 1955).

In re Fish's Estate, 219 Mich. 369.

Oklahoma Tax Com. v. *Texas Co.*, 336 U. S. 342.

Federal Compress & Warehouse Co. v. *McLean*, 291 U. S. 17, 78 L. Ed. 622.

Colorado Nat. Bank v. *Bedford*, 310 U. S. 11, 84 L. Ed. 1067.

Annotation 23 A. L. R. 248.

Union Trust Co. v. *Probate Judge*, 125 Mich. 487.

Federal Land Bank v. *Bismarck*, 314 U. S. 95, 86 L. Ed. 65.

Esso Standard Oil Co. v. *Evans*, 345 U. S. 495, 97 L. Ed. 1174.

It follows that the tax is valid, and defendant is entitled to a Judgment of No Cause of Action, with costs to be taxed.

I am also of the opinion that in any event, the motion to dismiss on the ground that plaintiffs have not exhausted the administrative remedies before bringing this suit is supported by the authorities. However, if the decision on the issue of validity is correct, it is not necessary to be further concerned about this point.

/S/ HERMAN DEHNKE,
Circuit Judge, Presiding by Assignment.

Dated: August 23, 1955.

JUDGMENT OF THE CIRCUIT COURT OF WAYNE COUNTY, MICHIGAN

(Filed August 25, 1955)

At a session of the Circuit Court for the County of Wayne held at the Court House, in the City of De-

troit, on the 25th day of August, 1955, Honorable Herman Dehnke, Circuit Judge.

The parties being again present, the Court heard the conclusion of the testimony, the arguments of counsel and finds that the defendants did not undertake and promise as the plaintiffs have complained against them.

Therefore, it is adjudged that the plaintiffs take nothing by their suit and that the defendants recover their costs to be taxed, and have execution therefor.

/s/ HERMAN DEHNKE,
Circuit Judge.

JUDGMENT OF THE SUPREME COURT OF MICHIGAN

(Filed May 14, 1956)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourteenth day of May, in the year of our Lord one thousand nine hundred and fifty-six.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,
EDWARD M. SHARPE,
TALBOT SMITH,
EMERSON R. BOYLES,
HARRY F. KELLY,
LELAND W. CARR,
EUGENE F. BLACK,
Associate Justices.

[Caption omitted]

The records and proceedings in this cause having been brought to this Court by appeal from the Circuit

Court for the County of Wayne, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Wayne be and the same is hereby in all things affirmed, and that the defendant do recover of the plaintiffs, its costs, to be taxed, and that it have execution therefor.